GMG OIL AND GAS CORP.
v.
MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-99-A Decided March 7, 1990

Appeal from a cancellation of an oil and gas lease of restricted Indian land.

Vacated and remanded.

1. Indians: Leases and Permits: Cancellation or Revocation--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Bonds

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs decision increasing a bond for an oil and gas lease under 25 CFR 213.15(c) is to determine whether the decision is reasonable, that is, whether it is supported by law and substantial evidence.

2. Administrative Procedure: Administrative Record--Bureau of Indian Affairs: Administrative Appeals: Generally

When the administrative record in an appeal from a Bureau of Indian Affairs decision is inadequate to support the decision, the decision will be vacated and the case remanded for development of an adequate record and of a new decision.

APPEARANCES: Donald W. Henson, Esq., Okmulgee, Oklahoma, for appellant; Alan R. Woodcock, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant GMG Oil and Gas Corp. challenges an August 21, 1989, decision of the Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), cancelling BIA lease No. 70059, Contract No. G02C1420-8126, for failure to post an increased bond. For the reasons discussed below, the Board vacates the Area Director's decision and remands this case for further proceedings.

Background

On February 26, 1985, Evelyn Hawkins now Parker, a Creek Indian, executed an oil and gas mining lease to appellant. The lease covered

Parker's restricted interest in the S½ NE¼ of sec. 15, T. 15 N., R. 13 E., Okmulgee County, Oklahoma, containing 80 acres. It was approved by the Area Director on March 21, 1985, for a "term of 3 years from and after the approval hereof * * * and as much longer thereafter as oil and/or gas is produced in paying quantities from said land."

In section 3(a) of the lease, appellant agreed to "furnish such bond as may be required by the regulations of the Secretary of the Interior, with satisfactory surety, or United States bonds as surety therefor, conditioned upon compliance with the terms of this lease." Appellant's initial bond was apparently in the amount of $2,500.

By special notice issued January 15, 1988, the Area Director announced:

> Effective immediately, all oil and gas leases on restricted lands of the Five Civilized Tribes and the members thereof under the supervision of the Officer in Charge of the Muskogee Area Office must be covered by a surety bond in the minimum amount of $5,000 per lease. This order is pursuant to authority under Title 25 of the Code of Federal Regulations, Part 211.6(c) and Part 213.15(c).

By letter of July 11, 1989, the Area Office advised appellant that its $2,500 bond was insufficient under the new requirement. Appellant was requested to submit a rider increasing its bond to $5,000 within 30 days and informed that failure to do so would subject the lease to cancellation under 25 CFR 213.40.

Appellant replied on July 13, 1989, stating: "We will be plugging this small well if we have to increase the bond. The well makes a small amount of oil. It's your choice; leave the bond at $2500.00 or plug and abandon. Let us know."

By letter of August 21, 1989, the Area Director informed appellant that its lease had been cancelled effective August 15, 1989, for failure to increase the bond and that it had the right to appeal the cancellation decision. 1/

Appellant's notice of appeal was received by the Board on September 5, 1989. Only appellee filed a brief

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1/ Although no issue of timeliness has been raised in this appeal, the Board notes that, under the version of 25 CFR 2.7 which became effective on Mar. 13, 1989 (54 FR 6481 (Feb. 10, 1989)), appellant's right to appeal the July 11, 1989, notice of bond increase continued until it was given notice of its appeal rights in the Aug. 21 letter.

In the absence of any evidence that appellant received the Jan. 15, 1988, special notice, the Board declines to consider whether appellant was obligated to appeal from that notice. For purposes of this decision, the Board considers the July 11 letter to be BIA's notice to appellant that its bond was being increased.

Discussion and Conclusions

Regulations governing the leasing of restricted lands of members of the Five Civilized Tribes for mining purposes are found at 25 CFR Part 213. 25 CFR 213.15 provides in part:

> (a) * * * Lease bonds, except as provided in paragraph (c) of this section, shall not be less than the following amounts:
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> * * * * * *
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> For 80 acres and less than 120 acres $1,500
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> * * * * * *
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> (c) The right is specifically reserved to increase the amount of bonds and the collateral security prescribed in paragraph (a) of this section in any particular case when the officer in charge deems it proper to do so.

25 CFR 213.40(a) provides:

> When in the opinion of the Secretary of the Interior, the lessee has violated any of the terms and conditions of a lease or of the applicable regulations, or if mining operations are conducted wastefully and without regard to good mining practice, the Secretary of the Interior shall have the right at any time after 30 days' notice to the lessee specifying the terms and conditions violated, and after a hearing, if the lessee shall so request within 30 days after issuance of the notice, to declare such lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land.

Appellant argues in its notice of appeal that

> the [Area Director's] position concerning this oil and gas lease is completely illogical and foolish. The subject lease has always been diligently operated by [appellant]. To [appellant's] knowledge no complaints have ever been lodged against [appellant] for the operation of this lease. The lease makes a small amount of oil and coupled with the large amount of royalty being paid to the lessor, this lease is marginal at best. Any additional expenses simply cannot be justified to continue operating this lease.

Appellant requests the Board to overturn the lease cancellation and allow appellant to continue operating under a bond of $2500.

The Area Director contends that his decision to require increased bonding was a discretionary decision over which the Board lacks jurisdiction

under 43 CFR 4.330(b)(2). 2/ Further, he argues that appellant has failed to meet its burden of proof because it has submitted no evidence to show that the increased bond requirement was unreasonable.

The Board has determined that various kinds of decisions by BIA officials are subject to limited review by the Board because they are based on the exercise of discretionary authority. These include decisions to acquire land in trust status for the benefit of Indians (e.g., City of Eagle Butte v. Aberdeen Area Director, 17 IBIA 192, 96 I.D. 328 (1989)); to approve conveyances of trust land (Escalanti v. Acting Phoenix Area Director, 17 IBIA 290 (1989)); and to approve loans or grants (e.g., Hamilton v. Acting Anadarko Area Director, 17 IBIA 152 (1989); Lower Elwha Tribe v. Portland Area Director, 18 IBIA 50 (1989); Honaghaahnii Marketing & Public Relations, Inc. v. Navajo Area Director, 18 IBIA 144 (1990)). The Board has frequently stated that, "[i]n reviewing a discretionary decision, it is not the Board's function to substitute its judgment for that of BIA. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion." Honaghaahnii, 18 IBIA at 148. The Board has also held that a discretionary decision by a BIA official should be reasonable. E.g., Absentee Shawnee Tribe v. Anadarko Area Director, 18 IBIA 156 (1990).

In a related line of cases, concerning BIA decisions which involve both expertise and judgment, such as decisions establishing rental rates for leases of Indian lands, the Board has held that its role is to determine whether BIA's decision was reasonable, that is, whether it is supported by law and by substantial evidence. It has further held that the burden is on an appellant to show that BIA's decision is unreasonable. See Navajo Nation v. Acting Deputy Assistant Secretary - Indian Affairs (Operations), 15 IBIA 179, 184-185, 94 I.D. 172, 175 (1987), and cases cited therein.

[1] A BIA decision increasing a bond under 25 CFR 213.15(c) is a decision requiring the exercise of both expertise and judgment. The Board concludes that the standard of review appropriate for such decisions is the standard developed in the rental rate adjustment cases and described in Navajo Nation. Therefore, it is the Board's role to determine whether the bond increase is reasonable, that is, whether it is supported by law and by substantial evidence. If it is reasonable the Board will not substitute its judgment for BIA's. An increase which is supported by evidence in the administrative record will not be overturned unless it is shown to be unreasonable. The burden is on an appellant to make such a showing. Cf. Pardee Petroleum Corp., 98 IBLA 20 (1987) (burden is on an appellant to show error

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2/ 43 CFR 4.330(b)(2) provides:

"Except as otherwise permitted by the Secretary or the Assistant Secretary - Indian Affairs by special delegation or request, the Board shall not adjudicate:

* * * * * * * *

"(b) Matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority."

in a Bureau of Land Management bond increase for Federal oil and gas operations).

In this case, although appellant has done little to demonstrate that the bond increase is unreasonable, there is nothing in the administrative record to show the reason for the increase. BIA has a responsibility to show some basis for its decision to increase appellant's bond. The Board is unable to conclude from the administrative record that the decision is supported by substantial evidence. Cf. Bien Mur Indian Market Center v. Deputy Assistant Secretary - Indian Affairs (Operations), 14 IBIA 231, 236 (1986), holding that, where BIA "provided no justification for the rental rate actually imposed, that rate is not supported by substantial evidence." See also Bowen v. American Hospital Association, 476 U.S. 610, 627 (1986), in which the Supreme Court noted the responsibility of a Federal agency to "explain the rationale and factual basis for its decision."

[2] Where the administrative record furnished to the Board does not support the decision, the decision must be vacated and the case remanded for development of an adequate record and issuance of a new decision. Atencio v. Albuquerque Area Director, 18 IBIA 126 (1990); Plain Feather v. Acting Billings Area Director, 18 IBIA 26 (1989).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Muskogee Area Director's August 21, 1989, decision is vacated, and this case is remanded to him for further proceedings in accordance with this opinion.

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Anita Vogt
Administrative Judge

I concur:

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Kathryn A Lynn
Chief Administrative Judge